Supreme Court, U. S.
FILED
MAR 10 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1137

ABE LAVINE, individually and in his capacity as Commissioner of the New York State Department of Social Services,

Appellant,

against

RONALD MILNE, DOUGLAS STREETER, ROBERT C. LEE, JOE NATHAN BEVERLY, WILLIE BEVERLY, ODELL BEVERLY, and JOHN BEVERLY, by their mother and next friend, ROBERTA BEVERLY, individually and on behalf of all other persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellant
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-3443

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

AMY JUVILER
Assistant Attorney General
of Counsel

TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Statute and Regulations Involved	3
Questions Presented	4
Statement of the Case	5
A. State Statute and Regulation	5
B. The Plaintiffs	9
1. *Ronald Milne*	9
2. *Robert C. Lee*	10
3. *Douglas Streeter*	11
4. *The Brothers Beverly*	11
C. Prior Proceedings	12
Argument	14
A. This appeal raises a substantial issue as to the reasonableness of a rebuttable statutory presumption which arises in an application proceeding and which deals with facts which are wholly within the knowledge and control of the applicant	15
1. The presumption does not deny the applicant due process of law because it can be rebutted	15
2. The presumption applied in this administrative proceeding does not shift the burden of proof or of going forward	17

PAGE

3. In the absence of evidence to the contrary, it is rational to find that a person quit his job with the intent of obtaining public assistance, if he applies for that assistance shortly after he terminated his employment 19

4. The enactment of this presumption was a proper exercise of Legislative power 22

5. It is reasonable to require an applicant for assistance to provide relevant evidence which is entirely within his possession ... 23

B. This appeal raises a substantial question whether a trial type formal hearing is required prior to the use of a rebuttable presumption to determine eligibility for State benefits 24

C. This appeal presents a substantial issue as to the scope of judicial power to enjoin statutory provisions relating to a class of persons when no plaintiff was a member of that class 27

Conclusion 31

TABLE OF CASES

Arnett v. *Kennedy*, 416 U.S. 202 (1974) 26

Bandini Petroleum Co. v. *Superior Court*, 284 U.S. 8 (1931) 18

Campbell v. *United States*, 365 U.S. 85 (1961) 24

Carrington v. *Rash*, 380 U.S. 89 (1965) 17

Dandridge v. *Williams*, 397 U.S. 471 (1970) 22, 23, 24

De Funis v. *Odegaard*, 416 U.S. 312 (1974) 29

PAGE

De Kalb Real Estate Board v. *Chairman and Board of Commissioners*, 372 F. Supp. 748 (N.D. Ga. 1973) 17

Electric Bond and Share Co. v. *Securities and Exchange Commission*, 303 U.S. 419 (1938) 29

Ferguson v. *Skrupa*, 372 U.S. 726 (1963) 23

G.E.J. Corp. v. *Uranium Aire, Inc.*, 311 F. 2d 749 (9th Cir. 1962) 24

Golden v. *Zwickler*, 394 U.S. 103 (1969) 29, 30

Hagans v. *Lavine*, —— U.S. ——, 94 C. Ct. 1372 (1974) 23

Hayburn's Case, 2 Dall. 409 (1792) 28

Leary v. *United States*, 395 U.S. 6 (1969) 17, 18, 19

Liverpool, N.Y. & P.S.S. Co. v. *Commissioners*, 113 U.S. 33 (1885) 30

Mobile J. & K.C.R. Co. v. *Turnipseed*, 219 U.S. 35 (1910) 18, 19, 20

Muskrat v. *United States*, 219 U.S. 346 (1911) 30-31

Nelson v. *Sugarman*, 361 F. Supp. 1132 (S.D.N.Y. 1971) 25

New York State Department of Social Services v. *Dublino*, 413 U.S. 405 (1973) 28

Owens v. *Roberts*, 377 F. Supp. 45 (M.D. Fla. 1974)..18, 19

Poe v. *Ullman*, 367 U.S. 497 (1961) 29, 30

Snell v. *Wyman*, 281 F. Supp. 853 (S.D.N.Y. 1968) aff'd 393 U.S. 323 (1969) 19, 23

San Antonio School District v. *Rodriguez*, 411 U.S. 1 (1973) 22, 23

SCM Corporation v. *Radio Corporation of America*, 407 F.2d 166 (2d Cir. 1969), *cert. denied* 395 U.S. 943 (1969) 29

PAGE

Stanley v. *Illinois*, 405 U.S. 645 (1972) 16

Starns v. *Malkerson*, 326 F.Supp. 234 (D. Minn. 1970) aff'd 401 U.S. 985 (1971) 19

Tileston v. *Ullman*, 318 U.S. 44 (1943) 29

Torres v. *New York State Department of Labor*, 333 F. Supp. 341 (S.D.N.Y. 1971), aff'd 405 U.S. 949 (1972) 26

Torres v. *New York State Department of Labor*, 321 F. Supp. 432 (S.D.N.Y. 1971), vacated and remanded 402 U.S. 968 (1971) 26

Tot v. *United States*, 319 U.S. 463 (1943) 17, 19, 24

United States v. *N.Y.N.H. & H.R.R. Co.*, 355 U.S. 253 (1957) 24

United States v. *Romano*, 382 U.S. 136 (1965) 17, 18

United States Dep't of Agriculture v. *Murry*, 413 U.S. 508 (1973) 16

Vlandis v. *Kline*, 412 U.S. 441 (1973) 16, 17

Statutes and Rules Cited

28 U.S.C.

§ 1253 2

§ 2281 11

§ 2284 11

42 U.S.C.

§ 602(a)(19) 8, 28

§ 607(b)(1) 8, 20

§ 633(g) 8

PAGE

McKinney's Session Laws of New York, 194th Sess. Laws of the Regular Session, 1971, Vol. 2, pp. 2636-7 6-7

Laws, 1971, Ch. 946 6

N.Y. Labor Law

§ 501 7

§ 593 7

NYSSL

§ 131(11) .....*in passim*

§ 158(a) 9

29 CFR

§ 57.13 8

45 CFR

§ 233.11 ..... 8, 28

18 NYCRR

§ 351.6 ..... 6, 18

§ 351.8 ..... 6, 18

§ 385.6(b) ..... *in passim*

§ 385.7 .....2, 4, 8, 13, 15

Other Authorities Cited

"Wigmore on Evidence," Third Edition, Vol. IX ..16, 23-24

INDEX TO APPENDIX

	PAGE
APPENDIX A—Opinion of the Three-Judge District Court Granting Declaratory and Injunctive Relief	1a
APPENDIX B—Final Judgment and Order of the Three-Judge District Court	17a
APPENDIX C—Memorandum Opinion and Order of the Three-Judge District Court Granting a Partial Stay of its Order Pending Appeal	20a
APPENDIX D—Notice of Appeal	21a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. .....

ABE LAVINE, individually and in his capacity as Commissioner of the New York State Department of Social Services,

Appellant,

against

RONALD MILNE, DOUGLAS STREETER, ROBERT C. LEE, JOE NATHAN BEVERLY, WILLIE BEVERLY, ODELL BEVERLY, and JOHN BEVERLY, by their mother and next friend, ROBERTA BEVERLY, individually and on behalf of all other persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

The Commissioner of the New York State Department of Social Services ("appellant") appeals from a final judgment and order of a three-judge district court for the Southern District of New York (OAKES, C.J., BONSAL, WYATT, D.JJ.) entered on December 13, 1974.

The final judgment and order declared invalid ". . . the presumption contained in the second sentence of New York

Social Services Law, § 131(11) (McKinney Supp. 1974) and 18 N.Y.C.R.R. § 385.7 that persons who voluntarily terminated their employment within 75 days preceding their application for Home Relief or Aid To Needy Families With Dependent Children assistance did so for the purpose of qualifying for or receiving a greater amount of such assistance . . ." (17a). The court found that the rebuttable presumption applicable to recipients of state financed Home Relief (HR) was irrational and, although no plaintiffs were applicants for Aid to Families with Dependent Children (AFDC), invalidated a parallel rebuttable presumption relating to persons who applied for AFDC within 30 days of voluntarily terminating their employment.

On January 22, 1975, the Court stayed so much of its final judgment and order as enjoins the defendant from enforcing the presumption in cases involving applicants for AFDC (18a).

Opinions Below

The opinion of the three-judge district court in *Milne et al.* v. *Berman, et al.*, dated November 11, 1974, granting declaratory and injunctive relief, is not reported but it is reproduced as Appendix A to this Jurisdictional Statement.

The memorandum opinion and order of the three-judge district court dated January 22, 1975, granting a partial stay pending this appeal is not reported, but it is reproduced as Appendix C to this Jurisdictional Statement.

Jurisdiction

The jurisdiction of this Court to consider this appeal is conferred by 28 U.S.C. § 1253.

The final judgment and order appealed from was entered in the District Court on December 13, 1974. The notice of

appeal to this Court was filed in the district court on January 10, 1975. The final judgment and order is reproduced as Appendix B and the notice of appeal is reproduced as Appendix D to this Jurisdictional Statement.

Statute and Regulations Involved

New York Social Services Law § 131(11) provides:

> "Any person who voluntarily terminated his employment or voluntarily reduced his earning capacity for the purpose of qualifying for home relief or aid to dependent children or a larger amount thereof shall be disqualified from receiving such assistance for seventy-five days from such termination or reduction, unless otherwise required by federal law or regulation. Any person who applies for home relief or aid to dependent children or requests an increase in his grant within seventy-five days after voluntarily terminating his employment or reducing his earning capacity shall, unless otherwise required by federal law or regulation, be deemed to have voluntarily terminated his employment or reduced his earning capacity for the purpose of qualifying for such assistance or a larger amount thereof, in the absence of evidence to the contrary supplied by such person."

18 New York Code of Rules and Regulations § 385.6(b) provides:

> "(b) Any person who applies for HR or requests an increase in his grant, within 75 days after voluntarily terminating employment or reducing his earning capacity or similarly within 30 days for ADC, shall be deemed to have voluntarily terminated employment or reduced his earning capacity for the purpose of qualifying for such or larger amount thereof in the absence of evidence to the contrary supplied by such person."

18 New York Code of Rules and Regulations § 385.7 provides:

"Sanctions, (a) a person who:

(1) voluntarily terminates employment or reduces his earning capacity for the purpose of qualifying for assistance or a larger amount thereof; or

(2) without good cause fails or refuses to undergo a necessary medical examination or treatment; or

(3) is required under this Part to receive manpower services and certification and without good cause fails or refuses to accept manpower services and certification; or

(4) is required under this Part to pick up his check semi-monthly at the State Employment Service and without good cause fails or refuses to do so; or

(5) without good cause fails or refuses to accept referral to and participate in a vocational rehabilitation program, shall be disqualified from receiving assistance for 30 days thereafter and until such time as he is willing to comply with the requirements of this Part, except that an applicant for or recipient of HR who voluntarily terminated employment or reduced his earning capacity shall be disqualified from receiving assistance for 75 days thereafter and until such time as he is willing to comply with the requirements of this Part."

Questions Presented

1. Whether the Constitution of the United States prohibits a State Legislature from defining eligibility for assistance in a totally state funded program by the use of a rebuttable presumption where the fact to be proved is logically connected to the facts giving rise to the presumption and where the fact to be proved is entirely within the knowledge and control of the applicant?

The Court below answered "yes". Appellant contends that the answer should be "no".

2. Whether an applicant for public assistance is deprived of a meaningful opportunity to present evidence to overcome a rebuttable presumption as to his eligibility because a fair hearing may be scheduled as long as 30 days after request even though he could present that evidence to the local Social Services Agency at any time?

The Court below answered "yes". Appellant contends the answer should be "no".

3. Whether there was a justiciable controversy before the Court below to justify its enjoining provisions affecting applicants for AFDC when there were no plaintiffs who were applicants for AFDC when the provisions affecting AFDC applicants are substantially different from those affecting HR applicants and when applicable federal law affects the eligibility of AFDC applicants who have recently terminated their employment but not that of HR applicants?

The Court below answered "yes" and extended its order to include persons not represented before it. Appellant contends that the answer should be "no" and that the reach of its order had to be limited to the class of HR applicants to which all named plaintiffs belonged.

Statement of the Case

A. State Statute and Regulation

The statute and regulation that were declared partially invalid by the district court, New York Social Services Law (NYSSL) § 131(11), (p. 3, *supra*) and 18 N.Y.C.R.R. § 385.7 (p. 4, *supra*) also see 18 N.Y.C.R.R. § 385.6(b)

[p. 3, *supra*]) condition eligibility for public assistance for persons who have recently voluntarily terminated employment. If that termination is for the purpose of obtaining public assistance or an increased grant, the person is not eligible for receiving that public assistance for seventy-five days. Because a purpose behind a person's terminating his employment is always within his knowledge and frequently unknown to others, the statute creates a rebuttable presumption that if there is a voluntary termination of employment and an application for public assistance within seventy-five days, the purpose of that termination was to receive public assistance. However, the applicant can introduce evidence to show that that was not his purpose. *Id.*

That evidence may be produced at the local Social Services office at the first interview or at any time thereafter just as any verification of data relating to eligibility may be produced. 18 NYCRR §§ 351.6, 351.8.

The intent of the legislature in enacting the provision was to deter persons from leaving employment without being able to sustain themselves for a reasonable period of time on the assumption that they would receive public support. As the Governor stated in approving the bill (L. 1971, Ch. 946):

> "The bill is designed to provide increased opportunities for gainful employment to persons who are presently dependent upon the welfare system and to deter gainfully employed persons from leaving their jobs in order to obtain public assistance, as I recommended to the Legislature in my Special Message on Welfare and Work.
>
> State employment offices will be required to establish special programs for unskilled workers and public assistance recipients. These programs will include the development and maintenance of job registers and specialized preparation and counseling to develop productive members of the work force." ("McKinney's Session Laws of New York 194th Session, Laws of the Regular Session, 1971", Vol. 2, pp. 2636-7.)

The legislature found that the availability of public assistance could be a disincentive to work and self-sufficiency. This statute is precisely designed to counteract that situation, because it does not affect the eligibility of persons who lost their employment involuntarily or who terminated their employment without regard to the availability of public assistance. A further purpose was to confine the finite sums appropriated for relieving poverty to the use of persons unable to provide for themselves.

Although public assistance is intended to meet basic needs of persons unable to support themselves, some employable persons may voluntarily terminate their employment, intending to support themselves by public assistance. This may not be a long term goal. They may intend only to rely on public assistance until they obtain new or more desirable employment. There is nothing "bad" about their motives (Compare Opinion of the Court below [10a]); but they cause an unnecessary drain on the public fisc and take a share of the finite public resources devoted to persons *unable* to support themselves.

This statute complements the public policy enunciated in the Labor Law for unemployment insurance, e.g., Labor Law §§ 501, 593. Persons who voluntarily terminate their employment without good cause are not eligible for unemployment insurance. *Id.* The statute reflects a policy that persons are responsible to support themselves wherever possible. If such persons automatically were eligible for public assistance, the Social Services Law would undermine the Labor Law. By creating a period of seventy-five days of ineligibility for persons who voluntarily terminate employment without good cause for the purpose of receiving public assistance, the deterrent effect of the Unemployment Insurance Law is not diluted, while destitute persons are not permanently cut off from public welfare funds.

The State regulations (18 NYCRR §§ 385.6(b), 385.7) track the statute except that the Commissioner reduced the period giving rise to the presumption and the period of ineligibility for recipients of AFDC to 30 days.* Thus, an applicant for AFDC who voluntarily terminated his employment and applied for AFDC more than 30 days but less than 75 days after that termination would not be required to rebut the presumption. Similarly, a person who did terminate his employment for the purpose of obtaining assistance would be eligible for AFDC on the 31st day after the termination.**

The purpose of this change was to dovetail with provisions of the Social Security Act relating to eligibility for AFDC when the father has been unemployed for at least 30 days. 42 U.S.C. § 607(b)(1) AFDC-U. It should be noted that the provision of the Federal statute is far broader than the State statute and regulation, since under the federal law the whole family is ineligible for 30 days and this is so even if the father lost his job involuntarily.

The provisions attacked also parallel federal law prohibiting recipients of federally aided categories of assistance from abandoning employment mandated as a condition for obtaining assistance, 42 U.S.C. §§ 602(a)(19)(F), 633(g), 29 CFR § 57.13, 45 CFR § 233.11.

The sanction period of ineligibility for refusal to participate in the Federal Work Incentive Program (WIN) is 90 days (29 CFR § 57.13)—longer than the 75 days imposed on HR applicants under NYSSL § 131(10).

---

* The Court below apparently did not understand the regulation since it consistently referred to the 75 day sanction period with regard to AFDC recipients. The effect of the statute on AFDC recipients was not discussed by the parties, since all the plaintiffs and applicants for intervention were applicants for HR.

** Even the 30 day sanction does not apply to needy children who are immediately eligible for assistance even though the caretaker adult voluntarily terminated employment for the purpose of obtaining public assistance. Compare 42 U.S. § 607(b)(1).

B. The Plaintiffs

All of the plaintiffs and applicants for intervention in the district court were applicants for receipt of public assistance in the HR category. Home relief is defined in NYSSL § 158(a):

> "Any person unable to provide for himself, or who is unable to secure support from a legally responsible relative, who is not receiving needed assistance or care under other provisions of this Chapter, or from other sources, shall be eligible for home relief."

The other provisions referred to are Aid to the Aged, Blind and Disabled, and to Dependent Children, which programs are supported by the Federal government and to which the substantive provisions of the Social Security Act apply. But assistance to needy persons not included within the federal categories is provided only by State law and thus eligibility is defined solely in State Law. All of the plaintiffs are individual recipients, not members of an assistance family or group.*

1. *Ronald Milne*

The original plaintiff in this case, Ronald Milne, claimed that he did not voluntarily terminate his employment but was forced to resign as a security guard at Columbia University. He was denied assistance by the Westchester County Department of Social Services on the basis of NYSSL § 131(11) on November 16, 1974, the day he applied (he had terminated his employment on November 9, 1974). The County Commissioner (then, defendant Berman) reconsidered his decision and determined Milne to be eligible as of November 16, 1975. Thus his complaint was moot before the three-judge Court hearing.

---

* While the Beverly brothers apparently lived together, they did not seek assistance as a family. In fact, only Joseph Beverly ever applied for assistance. (pp. 10-11, *infra*).

2. *Robert C. Lee*

Intervention on the part of Robert C. Lee was ordered by Judge Wyatt on March 27, 1974. Lee's employment as a machinist had been terminated on January 14, 1974 " 'due to a combination of excessive excused and unexcused lateness and absenteeism which proved discriminative to . . . [the] production schedule' " (Compl't ¶ 16). On January 29, 1974, he applied for public assistance. The Westchester County Department of Social Services denied his application on January 31, 1974. Apparently the local agency had found that he deliberately provoked his discharge to obtain public assistance.

On February 4, 1974, Mr. Lee filed an order to show cause and an application for a temporary restraining order in the United States District Court for the Southern District of New York which granted the restraining order, prohibiting the enforcement of the provisions of NYSSL § 131(11) against Intervenor Lee. The next day he requested a fair hearing. The hearing was scheduled on April 4, 1974. The hearing was adjourned upon a misunderstanding on the part of the local agency that Lee's status as a plaintiff in the Federal proceeding prevented the Department from holding a hearing on eligibility. However during all this time Mr. Lee was receiving public assistance benefits pursuant to the District Court's order.* On April 25, 1974, he defaulted at the hearing. Because Defendant Lavine did not deprive him of any benefit his complaint against the State defendant is moot.

---

* The opinion below criticizes the lateness of the hearing in the Lee case calling it a "Catch-22 approach to procedural due process" (15a). But Lee had been receiving assistance since the day *before he requested* a fair hearing. The Court's intemperate criticism of the State hearing procedure is inexplicable since it was the Court's order that required Lee to receive assistance pending the final determination in this case. Appellant's affidavit (Maher affidavit p. 8) also explained the fact. However plain-

(footnote continued on following page)

3. *Douglas Streeter*

Leave to intervene as a plaintiff was also granted to Streeter on March 27, 1974. Streeter's employment in a nursing home was terminated on January 4, 1974, after he claimed to be sick over the New Year holiday. He had previously sought public assistance after leaving a job (Streeter's complaint, ¶ 15). He applied for public assistance on January 13, 1974 to the Westchester County Department of Social Services. On January 16, 1974, the local agency found that he was ineligible for home relief. Streeter requested a fair hearing on January 28, 1974. On January 25, 1974, he had sought to intervene as a plaintiff in this case. On or about Feb[illegible]ary 4, 1974, the County Commissioner consented to grant assistance to Streeter pending the outcome of the proceeding.

A fair hearing was originally scheduled on February 28, 1974, but a month's adjournment was granted to the local agency because of the pendency of this proceeding as with Lee (p. 10, *supra*) and on assurance that Streeter was actually receiving assistance. A hearing was held on March 20, 1974 and on April 4, 1974, the decision reversing the local agency was rendered (Exhibit "C" appended to Maher Aff.). Streeter was found eligible for assistance. Thus appellee Streeter's complaint was moot before the three-judge district court's hearing.

4. *The Brothers Beverly*

Four brothers, Joseph, Odell, John and Willie Beverly were granted leave to intervene as plaintiffs on the complaint that Social Services Law § 131(11) had been unconstitutionally applied to them by the Ontario County Social Services Department, making them ineligible for public

---

(footnote continued from preceding page)

tiff's statement pursuant to Local Rule 9(g) (p. 10) submitted on the motion for summary judgment did not mention the restraining order issued by the District Court.

assistance. Actually only Joseph Beverly had ever applied for public assistance. (Maher Aff., Exhibit "E", pp. 15-16). The complaint of the other three should have been dismissed because they had no cause of action against any defendant. Since only Joseph worked regularly (Maher aff., Exhibit "E", p. 9) it is not clear that the presumption contained in NYSSL § 131(11) and 18 N.Y.C.R.R. § 385.6(b) would have been applied to the others.

Joseph terminated his employment with a produce company, claiming that after eviction from one place, he had no other place to live. Assistance had been denied on January 29, 1974. No request for a fair hearing was received until February 26, 1974. A hearing was held on March 14, 1974 and a decision denying assistance was rendered on March 28, 1974. The Commissioner found that Joseph Beverly had a place to live and had terminated his employment for the purpose of obtaining public assistance. (Maher aff., Exhibits "D", "E").

C. Prior Proceedings

This action was begun by Ronald Milne's filing his summons and complaint on December 19, 1973. Numerous proceedings involving intervention, requests for temporary restraining orders and discovery were held before the single judge district Court (WYATT, D.J.) between January 10, 1974 and May 10, 1974 when the three-judge district Court heard arguments on the cross motions for summary judgment and on the class action order (Docket Sheets).

Judge Wyatt determined that a three-judge Court should be convened pursuant to 28 U.S.C. §§ 2281, 2284 on February 20, 1974. Defendants had agreed that a three-judge court was required.

On November 11, 1974, the three-judge Court issued its opinion that the presumption contained in the second sentence of NYSSL § 131(11) and 18 N.Y.C.R.R. § 385.6(b)* was unconstitutional and should be enjoined (1a *et seq.*). The opinion closed "Settle an order or orders". Both sides submitted proposed orders differing on the definition of the class of persons affected. Appellees relying on the Court's opinion included recipients of AFDC. Appellant defined the class as applicants for HR since no plaintiff had applied for AFDC since the regulations affected AFDC recipients differently, and because Federal law had an impact on the eligibility of AFDC applicants relevant to this statute which it did not on applicants for the HR program.

Before the order was signed appellees brought a motion to cite appellant for contempt, claiming that the opinion itself was an order. On December 20, 1974, the Court granted the motion

> ". . . to the extent that Defendant Lavine will cause to be sent a letter on or before January 6, 1975, to all those members of the Class denied home relief assistance since November 12, 1974, advising such members that they may reapply for such assistance retroactive to November 12, 1974 . . ."

On December 13, 1974 the three-judge Court had entered a final judgment and order (17a) which enjoined the operation of the statute and regulation in the case of AFDC, as well as HR applicants. On January 22, 1975, upon the request of appellant, the Court stayed so much of the order as applied to applicants of AFDC pending the determination of this appeal (18a).

The notice of appeal to this Court was filed on January 10, 1975 (20a).

---

* While the Court enjoined "18 N.Y.C.R.R. § 385.7", the presumption is actually contained in § 385.6(b).

Argument

The District Court opinion if upheld invalidates the use of a *rebuttable* presumption against one applying for a state benefit. This Court has never invalidated the use of such a presumption in a Civil proceeding. The District Court invaded the province of the Legislature in setting standards of proof in a state administrative procedure. The Court discounted the fact that the statute gave the applicant the right to introduce "evidence to the contrary". The presumpion at issue doesn't reverse the burden of proof or of coming forward applicable in this proceeding.

The fact at issue is solely within the knowledge and control of the applicant but the District Court held that whether or not to apply a presumption in such a case is "a question of policy" and, denigrating the Legislature's policy determination, the Court made its own.

The District Court also stated that the applicant's only opportunity to present evidence was at the fair hearing reviewing his denial of assistance and that this was a denial of his right to due process. By ignoring the applicant's right to present rebuttal evidence to the local agency during and even after the application procedure, the Court seems to require the grant of assistance on demand pending the determination of eligibility at a formal hearing. The fiscal and conceptual implications of this decision would have a staggering impact on the administration of public assistance when the economy is already placing enormous pressures on it.

The District Court not only invaded the substantive province of the Legislature; but procedurally it overreached as well. All plaintiffs and applicants for intervention were seeking assistance for themselves as individuals under the HR category. Nonetheless the District Court declared invalid separate provisions of the statute and regulation affecting applicants for AFDC.

The affect on AFDC applicants is very different from that on HR applicants, although the Court did not acknowledge that. In the case of an application for AFDC the presumption arises only if assistance is sought within 30, rather than 75, days of voluntary termination of employment (18 N.Y.C.R.R. § 385.6[b]) and AFDC recipients are only ineligible for assistance for 30, rather than 75, days after voluntary termination of employment (18 N.Y.C.R.R. § 385.7[5]). The affect of this presumption on AFDC applicants is less restrictive than that imposed by Congress on the same family. If eligibility is claimed because a father is unemployed, the entire family is ineligible until he has been unmployed for at least 30 days. Under the WIN program AFDC recipients similarly are prohibited from voluntarily terminating their employment.

The decision below substantially oversteps the bounds of judicial power in direct contravention of the consistent teachings of this Court. The District Court's misunderstanding of the nature of a rebuttable presumption and of the procedure for applying for State benefits can only be corrected by this Court's granting plenary review.

A.

This appeal raises a substantial issue as to the reasonableness of a rebuttable statutory presumption which arises in an application proceeding and which deals with facts which are wholly within the knowledge and control of the applicant.

1. The presumption does not deny the applicant due process of law because it can be rebutted

The District Court invalidated a rebuttable presumption applied in determining eligbility for State funded assistance on the ground that there was not a sufficient connection between the "known fact" and the "presumed fact".

In doing so it relied in part on two decisions of this Court invalidating irrebuttable presumptions (6a). *United States Dept. of Agriculture* v. *Murry*, 413 U.S. 508 (1973) (conclusion that a household is not in need of food stamps from fact that one person over 18 is claimed as a dependent for Federal income tax purposes by a person not a member of the household); *Vlandis* v. *Kline*, 412 U.S. 441 (1973) (conclusion that college student is not a Connecticut resident from fact that he was not a resident the year before he was admitted).

These opinions do not support the decision of the Court below. There is no more than a semantic resemblance between a rebuttable presumption like that presented here and the irrebuttable ones invalidated in those cases. In fact Wigmore says that a conclusive presumption is not a presumption at all. "Wigmore on Evidence," Third Edition, Vol. IX, § 249 (p. 292). The very criticism of an irrebuttable presumption is that no evidence on the subject is even considered.

In *Stanley* v. *Illinois*, 405 U.S. 645 (1972), this Court specifically approved a rebuttable presumption of unfitness of an unwed father, but rejected an irrebuttable one (*Id.* at 654-5):

> "It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents. It may also be that Stanley is such a parent and that his children should be placed in other hands. But all unmarried fathers are not in this category; some are wholly suited to have custody of their children. This much the State readily concedes, and nothing in this record indicates that Stanley is or has been a neglectful father who has not cared for his children. Given the opportunity to make his case, Stanley may have been seen to be deserving of custody of his offspring." [marginal notes omitted].

In *Carrington* v. *Rash*, 380 U.S. 89 (1965), this Court struck down a Texas statute permanently prohibiting men who entered the Armed Services from another State from being eligible to vote in Texas while serving in the military. The evil was ". . . forbidding a soldier ever to controvert the presumption of non-residence". *Id.* at 96. In *Vlandis* v. *Kline, supra*, this Court struck down the unlimited conclusive presumption of out-of-state residence in determining the fees of a public University; but specifically upheld a rebuttable one.

2. The presumption applied in this administrative proceeding does not shift the burden of proof or of going forward.

The District Court also relied on three decisions of this Court as to the validity of invoking a presumption against a defendant in a criminal case. *Leary* v. *United States*, 395 U.S. 6 (1969) (knowledge of illegal importation of marijuana presumed from its possession); *United States* v. *Romano*, 382 U.S. 136 (1965) (illegal production of liquor presumed from presence at the site of an illegal still); *Tot* v. *United States*, 319 U.S. 463 (1943) (presumption that a firearm was received in interstate or foreign commerce after the effective date of the statute from the fact that a defendant who had formerly been convicted of a crime of violence had it in his possession).

It also relied on the unusual decision of the District Court in Georgia in *DeKalb Real Estate Board* v. *Chairman and Board of Commissioners*, 372 F. Supp. 748 (N.D. Ga. 1973). That case involved a presumption that a Real Estate broker had violated an anti-blockbusting ordinance from the existence of a "For Sale" sign with his name located on residential real estate. Apparently the violation of that ordinance was a crime or closely akin to a crime (*Id.* at 756) and the Court relied almost exclusively on criminal cases (*Id. at* 752-4).

The possibility that a presumption will constitute a denial of due process of law is far greater in a criminal conviction than it is in a civil proceeding. A criminal defendant is presumed innocent and the prosecution has the burden of proving each element of the crime. A presumption in that case reverses the burden of proof and the burden of going forward. The standard of rationality which a presumption in a criminal trial must meet is far stricter than that in a civil case. This Court emphasized the special nature of a presumption used in a criminal trial in *Leary, supra* at 35 and at 55 (BLACK concurring) and in *Romano, supra* at 144.

There is no reversal of the burden of proof or the burden of going forward presented here. The applicant for assistance has the obligation to provide the information necessary to establish eligibility. Indeed the presumption here merely clarifies the duty of the applicant to introduce evidence of his purpose in voluntarily terminating his employment. E.g. 18 N.Y.C.R.R. §§ 351.6, 351.8.

The Court below did cite two decisions of this Court in which rebuttable presumptions in civil cases were discussed (p. 6a); but in both cases the presumptions were sustained. *Bandini Petroleum Co.* v. *Superior Court,* 284 U.S. 8 (1931) (waste of natural gas presumed from its release); *Mobile J & K.C.R. Co.* v. *Turnipseed,* 219 U.S. 35 (1910) (negligence presumed from proof of injury inflicted by the running of locomotives on railway cars).

The only support for the Court's opinion is found in a Florida District Court opinion, *Owens* v. *Roberts,* 377 F. Supp. 45 (M.D. Fla. 1974). Two presumptions were at issue in that case, one rebuttable and one irrebuttable. Both were invalidated. The irrebuttable presumption was that a fraudulent transfer of assets is presumed from the transfer of an asset worth at least $600 for less than its value. The injunction of that irrebuttable presumption does not support the decision below. But the Court went

farther and enjoined a rebuttable presumption of ineligibility for public assistance from the fact that a person transferred an asset within two years prior to or during receipt of assistance. In the Court's discussion it substituted its personal policies and perceptions of a "typical honest welfare recipient" (*Id.* at 53) for that of the Legislature just as the Court below did. Compare *Leary* v. *United States, supra; Tot* v. *United States, supra; Mobile J. & K.C.R. Co.* v. *Turnipseed, supra; Snell* v. *Wyman,* 281 F. Supp. 853 (S.D.N.Y. 1968), aff'd 393 U.S. 323 (1969). However unlike this case, the Court also had alternative grounds, finding the statute in violation of the Social Security Act.

In *Owens, supra* the consequence of a sustaining of the presumption was far more severe. In that case aged and disabled recipients were found to be ineligible for any assistance for two years. Here an able bodied person would be ineligible for only 75 days and an applicant for AFDC for only 30 days. The statute does not apply to the Aged, Blind and Disabled.

In *Vlandis* v. *Kline, supra,* this Court emphasized the importance of the duration of the disability as a factor in assessing the rationality of a rule of evidence. It struck down a permanent irrebuttable presumption of non-residence but approved a conclusive presumption of non-residence for one year. *Id.* at 450-4. Also see *Starns* v. *Malkerson,* 326 F. Supp. 234 (D. Minn. 1970) aff'd. 401 U.S. 985 (1971). The limited period of ineligibility at issue here supports the rationality of the presumption.

3. In the absence of evidence to the contrary, it is rational to find that a person quit his job with the intent of obtaining public assistance, if he applies for that assistance shortly after he terminated his employment.

The Florida District Court also criticized the State statute and regulation for being over-broad. *Owens* v. *Roberts, supra.* The New York statute and regulations are precisely

drawn to affect only the persons who could have been deterred by its provisions, since deterrence is the purpose of the statute. It could have made all recently employed persons ineligible for public assistance for a fixed period of time. Congress did that in defining eligibility for AFDC-U [42 U.S.C. § 607(b)(1)]. It could have made all persons who voluntarily terminated their employment ineligible for assistance permanently or for a given period of time. In neither instance would the Fourteenth Amendment be violated. Instead the presumption only is triggered when a person *voluntarily* terminates his employment and within a short time applies for public assistance. The voluntary termination of employment combined with a contemporaneous allegation of destitution is some evidence that at the time of termination the applicant intended to seek public support. At the very least there is a rational relationship between the proven fact and the presumed fact.

The standard by which the validity of a rebuttable presumption is measured in a Civil case was stated in *Mobile J. & K.C.R.R.* v. *Turnipseed, supra* at 43:

> "That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed."

Certainly the connection between the fact proved and that inferred in this case is not purely arbitrary. Even the District Court did not find the presumption to be entirely arbitrary. It merely said that most people do not leave their employment to obtain public assistance (pp.

7a-9a). That does not show that the relationship between the two sets of facts is irrational. The purpose of the statute is to deter people from leaving employment. If it works well there will be few people who will terminate employment without the ability to support themselves in the short run and, of those, fewer still who will not be able to overcome the presumption.

The District Court emphasized (8a) that illness was a reason commonly ascribed for leaving employment, suggesting that persons who were ill would be sanctioned under this program, but that is not the case. If the termination of employment was involuntary,* the presumption would not arise. If it was a voluntary termination, proof of illness would overcome the presumption. Verification of illness is specifically referred to as evidence which would rebut the presumption (Maher aff. pp. 5-6, Exh. A).

The District Court cited some statistics and a smattering of reports and concluded (p. 8a):

> 'We do not think it can be stated as a general rule, as the statutory presumption would have it, that poor people do not have the same desire to work and to obtain the fruits of work as the non-poor."

If that straw man were the statutory presumption at issue the materials would be relevant. No bad motive is imputed to any applicant by the Legislature. Indeed a better argument could be made for a holding that the District Court had irrationally imputed a bad motive to the Legislature which actually appropriates the resources for the support of all needy persons.

---

* The District Court noted that appellees Milne and Streeter did not voluntarily terminate their employment and that the presumption was misapplied to them (15a, n. 4). Misapplication of a statute is not grounds for invalidating it. Appellant Lavine took steps to prevent misapplication after these cases were brought to his attention (Maher aff. pp. 5-6, Exhibit A).

The Court below ignored the fact that people with other reasons for leaving their jobs also may intend to obtain public support, at least in the short run. Most people work to obtain money to support themselves. Many people have non-frivolous dissatisfactions with their jobs from time to time; but it is not usual to terminate one's employment voluntarily without a notion of how one will keep the wolf from the door until a new source of income is found. The Legislature did not want the availability of public assistance to induce people to leave their jobs without providing for their own support for a reasonable period thereafter.*

It should be noted that HR recipients do not have a basic disability in supporting themselves, such as health age or the necessity to care for children, as do the recipients of the categories of assistance partially supported by Federal funds.

4. The enactment of this presumption was a proper exercise of Legislative power

In discounting the reasoning of the Legislature, the District Court substituted its own judgment in contravention of this Court's repeated statements that such overreaching is impermissible. E.g. *San Antonio School District* v. *Rodriquez,* 411 U.S. 1, 33-4 (1973); *Dandridge* v. *Williams,* 397 U.S. 471, 487 (1970).

---

* The Court suggested that 75 days was too long a period (p. 10a); but the length of time is strictly a matter of state policy for the measurement of which there are no judicially cognizable standards. In fact the named plaintiffs applied much more quickly after leaving their jobs. Milne applied 7 days after terminating employment; Lee applied 15 days after his employment was terminated; Streeter applied 9 days after his employment was terminated; Joseph Beverly left his job after receiving his pay on January 25, 1974, and applied for assistance four days later. Obviously proximity of the time of application to termination is a relevant factor in determining whether the applicant intended to obtain assistance.

The Court below rejected these decisions as irrelevant because they dealt with the right to equal protection of laws; but the same deference to legislative discretion is required if a statute is attacked on the basis of due process clause of the Fourteenth Amendment. E.g. *Ferguson* v. *Skrupa,* 372 U.S. 726, 728-30 (1963); *Snell* v. *Wyman,* 281 F. Supp. 853, 862-3 (S.D.N.Y. 1968), aff'd 393 U.S. 323 (1969). The judicial restraint exercised by the Court in *Snell, supra,* is in marked contrast to the overreaching of this decision. The *Snell* decision was specifically approved by this Court in *Dandridge* v. *Williams, supra* at 485.

This Court's decision in *Hagans* v. *Lavine,* — U.S. —, 94 S. Ct. 1372 (1974), regarding Federal jurisdiction did not overrule the substantive holdings of *San Antonio School District* v. *Rodriguez, supra* or *Dandridge* v. *Williams, supra,* as was suggested by the District Court (11a).

5. It is reasonable to require an applicant for assistance to provide relevant evidence which is entirely within his possession.

The imposition of the presumption on applicants for assistance is particularly appropriate in this instance because the fact to be proved is peculiarly within the knowledge and control of the applicant. It is his intent that is at issue. His oral statements will frequently be enough to overcome the presumption. Since the applicant has the burden of proving his eligibility in any event, it was reasonable of the Legislature to require him to introduce evidence to prove that he did not intend to be supported by the public after he terminated his employment. "Wigmore on Evidence", Third Edition, Vol. IX, § 2486, p. 275:

> "the burden of proving a fact is said to be put on the *party who presumably has peculiar means of knowledge* enabling him to prove its falsity if it is false. This principle has received frequent applica-

tion in modern statutes making it an offense to pursue a certain occupation without a *State* license or forbidding a certain act unless in personal circumstances justifying an exception."

Also see *Campbell* v. *United States*, 365 U.S. 85, 96 (1961) (defendant has right to production of statements and reports of government witnesses); *United States* v. *N.Y.N.H. & H. R.R. Co.*, 355 U.S. 253, 256 n. 5 (1957) (carrier has the burden of proving the correctness of its bills); *G.E.J. Corp.* v. *Uranium Aire, Inc.*, 311 F. 2d 749, 751 (9th Cir. 1962) (to defend its option the defendant had the burden of proving the quality of its mines).

While the control of the fact to be proved may not be an independent justification for creating a presumption (*Tot* v. *United States, supra* at 467-8), where the facts proved are related to the facts to be determined, it is reasonable to place the burden of coming forward on the party with the peculiar knowledge of the subject matter.

The District Court rejected this reasoning, stating that it was a "question of policy" (10a) whether to employ the presumption. With no further ado the Court enunciated its policy which is contrary to the State Legislature's. The legislating of rules of evidence always is a "question of policy"; but questions of policy are, by definition, the exclusive province of democratically elected legislatures, e.g., *Dandridge* v. *Williams, supra.*

B.

This appeal raises a substantial question whether a trial type formal hearing is required prior to the use of a rebuttable presumption to determine eligibility for State benefits.

Evidence to rebut the presumption contained in NYSSL § 131(11) and 18 N.Y.C.R.R. § 385.6(b) can be presented to the local agency at any time, even after assistance has been denied. The local Commissioner has the power to reconsider a prior determination as he did in the case of Milne (p. 9, *supra*). The Court below inexplicably ignored the procedures at the application stage.

The Court suggested* that the formal State fair hearings were not scheduled promptly enough to afford plaintiffs their right to due process of law. At the time this suit was brought defendant Lavine was subject to a permanent injunction governing review of denials of assistance. The Department's performance was being monitored by the United States District Court for the Southern District of New York (MOTLEY, D.J.). *Nelson* v. *Sugarman.* See 361 F. Supp. 1132 ( ) S.D.N.Y. 1971 ( ) (permanent injunction issued 12/11/73.) The injunction required that a fair hearing decision be rendered within 90 days of the request following the denial of an application for assistance.

Since all plaintiffs were members of the class granted the injunction in *Nelson, supra,* the District Court in this case was bound by Judge Motley's determination.

Plaintiffs could not be afforded any special consideration in scheduling fair hearings. All other applicants who had been denied for reasons other than ineligibility under NYSSL § 131(11) also claim to be destitute.

The only named plaintiff who was not receiving assistance at the time the fair hearing was held was Joseph Beverly and the hearing was scheduled promptly. Beverly's request for a hearing was received on February 26, 1974, a hearing was held on March 14, 1974 and a decision rendered on March 28, 1974.

---

* The Court stated that it did not reach the question whether applicants have an opportunity to rebut the presumption prior to their denial of assistance (5a), but parenthetically it stated that there is no opportunity to present evidence except at a belated fair hearing (15a n. 5). It is the purpose of this section to answer that misguided statement.

The District Court's reference to Lee's hearing (15a, n. 4) was completely inaccurate. In the first place, he had been granted assistance by the District Court even before he requested a fair hearing so any delay would not work to his disadvantage. Secondly he defaulted at his hearing on April 25, 1974 and never sought reconsideration of the local Commissioner's denial.

In any event the procedure before the local agency sufficiently comports with the requirements of due process of law which is a flexible concept adjusted to the particular nature of the hearing.

In *Torres* v. *New York State Department of Labor,* 333 F. Supp. 341 (S.D.N.Y. 1971), aff'd 405 U.S. 949 (1972)*, the Court upheld the hearing procedure employed before unemployment insurance benefits are suspended which includes an interview and an opportunity to present favorable facts. The application procedure for public assistance is the same as for unemployment insurance and this case is even stronger since the issue is initial eligibility rather than the termination of assistance previously granted.

In *Arnett* v. *Kennedy,* 416 U.S. 202 (1974), this Court held that a federal employee could be discharged before he had a trial-type pre-termination hearing. Yet the Court below suggested that a trial-type hearing was required before an *application* for benefits could be denied. The result of such a policy would mean that the mere application for assistance would warrant the granting of it pending the outcome of a trial-type fair hearing. This waste of precious resources is not required by the Constitution.

---

* The Court reiterated its previous decision in *Torres* v. *New York State Department of Labor,* 321 F. Supp. 432 (S.D.N.Y. 1971), vacated and remanded 402 U.S. 968 (1971).

C.

This appeal presents a substantial issue as to the scope of judicial power to enjoin statutory provisions relating to a class of persons when no plaintiff was a member of that class.

The District Court enjoined the provisions of NYSSL (§ 131(11) and 18 N.Y.C.R.R. § 385.6(b)(1) both with regard to applicants for HR and AFDC (18a) although the affect on each group is significantly different and although no plaintiff was a recipient of AFDC. The record* before the Court below was silent as to the application of the law to AFDC recipients.** There was no evidence that the presumption at issue had ever affected an AFDC recipient.

The presumption is triggered in the case of an AFDC applicant only if he applies for assistance within 30 days of the termination of his employment. For HR recipients it is 75 days. The Court did not discuss whether an application for assistance within 30, rather than 75, days was a rational basis for the presumption.

It would be anomalous to vacate a presumption which might sanction a caretaker adult of an AFDC family for 30 days if he failed to overcome the presumption when there is an absolute sanction on assistance for a whole family for 30 days after an involuntary termination of employment if it is family with an unemployed father.

Federal law applies to AFDC families; but the Court below did not explore its implications. The state regulations

---

* The only discussion of AFDC recipients before the District Court was contained in the memoranda submitted in support of the counter-orders.

** Apparently the record was so sparse that the Court misunderstood the provisions affecting applicants for AFDC. It assumed that they were identical with HR applicants and that an application within 75 days of voluntary termination of employment gave rise to the presumption in AFDC cases, as well.

were approved by HEW. Federal law specifically defines the AFDC recipient's obligation to work e.g. S. 42 U.S.C. § 602(a) (19); 45 C.F.R. § 233.11. Generally see *N. Y. St. Dep't of Social Services* v. *Dublino*, 413 U.S. 405 (1973).

Because all named plaintiffs were applicants for HR and because there are such significant differences in the effect of this presumption on HR and AFDC applicants, the class represented by the named plaintiffs should have included only applicants for HR. In its decision, the District Court recognized that the class consisted of only HR applicants (12a); but then extended its relief to AFDC applicants, as well (12a, 16a, n. 7). Neither the named plaintiffs nor any other HR applicant have a justiciable interest in the presumption as it applies to AFDC recipients.

The Court below was limited in the scope of its order at least by Article III of the Constitution which restricts judicial power to "cases" or "controversies". Had the Constitution intended to allow the courts to make executive and administrative decisions it would not have so limited their power. But this limitation is a necessary concomitant of the separation of powers.

In holding that the Circuit Courts could not administer pension claims under the direction of an officer of the Executive, this Court in 1792 held (*Hayburn's Case*, 2 Dall. 409):

> "That by the Constitution of the United States, the government thereof is divided into three distinct and independent branches, and that it is the duty of each to abstain from, and to oppose, encroachments on either.
>
> That neither the legislative nor the executive branches can constitutionally assign to the judicial any duties but such as are properly judicial, and to be performed in a judicial manner."

In *SCM Corporation* v. *Radio Corporation of America*, 407 F. 2d 166 (2d Cir. 1969), *cert. denied* 395 U. S. 943 (1969), the Court held that the defendant could not counterclaim on the basis of injury to its licensees. *Id.* at 170. In so holding it stated a rule whose analogue is applicable to this case as well:

> "Standing to sue was not given by Congress to any and every citizen who, motivated by public spirit or possibly some baser reason, would set himself up as a watchdog of business behavior. Congress properly bestowed the right to sue only on such persons as might be injured in their business or property *by reason* of anything forbidden in the antitrust laws." *Id.* at 171.

For plaintiffs to be afforded relief not in their own interest is contrary to the basic function of the judicial office of the Courts in this country. *Tileston* v. *Ullman*, 318 U. S. 44 (1943). It has frequently been held that parties cannot agree to bring a test case (*Poe* v. *Ullman*, 367 U. S. 497 [1961]), nor can they seek to attack an entire statute where their rights have not been infringed by all of its provisions. *Electric Bond and Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419, 443 (1938).

The District Court here was not called on to adjudge the legal right of any applicant for AFDC. Instead it found what it thought to be a violation of a technical statutory requirement in the abstract and overreached to resolve a potential controversy not before it.

This is contrary to the teaching of *De Funis* v. *Odegaard*, 416 U. S. 312 (1974) and *Golden* v. *Zwickler*, 394 U. S. 103 (1969), in which fortuituous circumstances mooted plaintiffs' claims. Nonetheless, this Court held that they could not continue their suits raising very interesting constitutional questions. At the very least, a justiciable contro-

versy must be one presented ". . . in the context of a specific live grievance". *Golden* v. *Zwickler, supra,* at 110.

This limitation on the judiciary is especially strict when the validity of a state statute is at stake, e.g., *Golden* v. *Zwickler, supra.* As this Court analyzed such a question (*Poe* v. *Ullman,* 367 U. S. 497, 503-504):

> "The various doctrines of 'standing,' 'ripeness,' and 'mootness,' which this Court has evolved with particular, though not exclusive, reference to such cases are but several manifestations—each having its own 'varied application'—of the primary conception that federal judicial power is to be exercised to strike down legislation, whether state or federal, only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action."

In *Liverpool, N.Y. & P.S.S. Co.* v. *Commissioners,* 113 U. S. 33, 39 (1885), this Court held that the judiciary does not have the power to declare a state statute void:

> "except as it is called upon to adjudge the legal rights of litigants in actual controversies."

In *Muskrat* v. *United States,* 219 U. S. 346 (1911), this Court explained the delicate relations among the organs of government when the validity of a statute is brought before a court (*Id.* at 361):

> "The right to declare a law unconstitutional arises because of an act of Congress relied upon by one or the other of such parties in determining their rights is in conflict with the fundamental law. The exercise of this, the most important and delicate duty of this court, is not given to it as a body with revisory power over the action of Congress, but because the rights of the litigants in justiciable controversies require the

> court to choose between the fundamental law and a law purporting to be enacted within constitutional authority, but in fact beyond the power delegated to the legislative branch of the Government. This attempt to obtain a judicial declaration of the validity of the act of Congress is not presented in a 'case' or 'controversy', to which, under the Constitution of the United States, the judicial power alone extends."

Similarly, here the decision that provisions of the statute relating to AFDC applicants are in violation of the Constitution is not presented in a "controversy" between plaintiffs and defendants.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction and grant plenary consideration to the instant appeal.

Dated: New York, New York, March 7, 1975.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the State of
New York
Attorney for Appellants

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

AMY JUVILER
Assistant Attorney General
of Counsel

APPENDIX A

Opinion of the Three-Judge District Court Granting Declaratory and Injunctive Relief.

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

No. 73 Civ. 5397

Ronald Milne, individually and on behalf of all other persons similarly situated,

Plaintiff,

and

Douglas Streeter, Robert C. Lee, Joe Nathan Beverly, Willie Beverly, Odell Beverly, and John Beverly, by their mother and next friend, Roberta Beverly, individually and on behalf of all other persons similarly situated,

Intervenor-Plaintiffs,

v.

Leonard Berman, individually and as Commissioner of the Westchester County Department of Social Services, and Abe Lavine, individually and as Commissioner of the New York State Department of Social Services,

Defendants,

and

George E. Boisvert, individually and as Commissioner of the Ontario County Department of Social Services,

Intervenor-Defendants.

Before OAKES, *Circuit Judge*, BONSAL and WYATT, *District Judges*.

Gerald A. Norlander, White Plains, N. Y. (The Legal Aid Society of Westchester County, White Plains, N. Y., Martin A. Schwartz, Catherine Cronin and Hillary Sohmer, of counsel), for Plaintiffs.

Gerald A. McIntyre, Corning, N. Y. (Monroe County Legal Assistance Corp., Flood Disaster Relief Project), for Intervenor-Plaintiffs.

Amy Juviler, Assistant Attorney General (Louis J. Lefkowitz, Attorney General of the State of New York, of counsel), for Defendant Lavine.

Richard A. McAtamney, White Plains, N.Y. (Harry Lott, Westchester County Attorney), for Defendant Berman.

Harrison Downe, Canandaigua, N. Y., for Intervenor-Defendant.

OPINION

OAKES, *Circuit Judge:*

The named plaintiff and intervenor plaintiffs, welfare recipients, herein collectively "plaintiffs," seek on behalf of themselves and others similarly situated, declaratory relief, injunctive relief, and damages against the Commissioner of the New York State Department of Social Services and the Commissioner of the Westchester County Department of Social Services. Plaintiffs claim that a New York welfare statute, N.Y. Soc. Serv. Law § 131(10)

(McKinney Supp. 1973), and a regulation of the New York State Department of Social Services promulgated pursuant thereto, 18 N.Y.C.R.R. § 385.7,[1] violate the due process and equal protection clauses of the fourteenth amendment to the United States Constitution. The statute and regulation disqualify from receipt of assistance for 75 days persons who voluntarily terminate their employment or reduce their earning capacity for the purpose of qualifying for Home Relief or Aid to Families with Dependent Children. The claims of plaintiffs, as later more fully discussed, are specifically directed to a further provision of the statute and regulation which states that a person who applies for assistance within 75 days after voluntarily terminating his employment or reducing his earning capacity shall "be deemed" to have done so "for the purpose of qualifying for such assistance or a larger amount thereof, in the absence of evidence to the contrary supplied by such person."

Jurisdiction of this court is based upon 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983 since plaintiffs' complaint alleges a substantial claim involving the denial by defendants, acting under color of state law, of rights guaranteed by the fourteenth amendment to the United States Constitution. Declaratory relief is sought pursuant to 28 U.S.C. § 2201, injunctive relief under 28 U.S.C. § 2202 and compensatory and punitive damages under 42 U.S.C. § 1983. *See Hagans* v. *Lavine,* 42 U.S.L.W. 4381, 4384-86 (U.S. Mar. 25, 1974).

Because plaintiffs seek to enjoin the enforcement of a state statute, N.Y. Soc. Serv. Law § 131(10) (McKinney Supp. 1973), on the ground that it is contrary to the Constitution of the United States, a three-judge court was convened pursuant to 28 U.S.C. §§ 2281, 2284.

I.

There are before the court motions from three separate movants: plaintiffs, intervenors and defendant Lavine.

The first motions to be considered will be those by plaintiffs (1) for an order determining that the action may be maintained as a class action (Fed. R. Civ. P. 23(c)(1)), and (2) for "final summary judgment in favor of plaintiffs for the declaratory and injunctive relief prayed for in paragraphs (D), (E) and (F) of the Wherefore Clause of the Amended Complaint" (Fed. R. Civ. P. 56). We shall first consider the summary judgment motion and later treat the class action motion.

A. *Summary judgment.*

Section 131(10) of the New York Social Services Law provides as follows:

> Any person who volutarily terminated his employment or voluntarily reduced his earning capacity for the purpose of qualifying for home relief or aid to dependent children or a larger amount thereof shall be disqualified from receiving such assistance for seventy-five days from such termination or reduction, unless otherwise required by federal law or regulation. Any person who applies for home relief or aid to dependent children or requests an increase in his grant within seventy-five days after voluntarily terminating his employment or reducing his earning capacity shall, unless otherwise required by federal law or regulation, be deemed to have voluntarily terminated his employment or reduced his earning capacity for the purpose of qualifying for such assistance or a larger amount thereof, *in the absence of evidence to the contrary supplied by such person.*

(Emphasis added.)

Plaintiffs make three basic arguments:

1. The statutory presumption of a wrongful intent to obtain welfare benefits is irrational and thus violates the

due process clause because there is a logically insufficient connection between provable facts (that an applicant voluntarily terminated his emloyment or reduced his earning capacity) and the presumed fact (that he did so for the purpose of qualifying for assistance or a larger amount thereof);

2. The challenged statute operates conclusively to presume essential facts in violation of the due process clause because plaintiffs are not afforded timely hearings—they have no opportunity to rebut the presumption of the statute and regulations at the time they apply for assistance and, by the time the State actually holds a hearing at which rebuttal evidence can be introduced and renders a final decision, the 75 days referred to in the statute have expired; and

3. The statute violates the equal protection clause because it arbitrarily burdens the plaintiffs' class with a presumption of ill motive—other applicants for public assistance being entitled to apply and have their eligibility assessed free of any negative presumption.

Since we agree with the plaintiffs on their first point, it is unnecessary for us at this stage to reach the second or the third.

On its face, the challenged statute provides that a person who applies for public assistance within 75 days after the voluntary termination of his employment is presumed to have terminated his employment "for the purpose of qualifying for . . . assistance . . . , in the absence of evidence to the contrary supplied by such persons." The regulation in question in subparagraph (b) simply restates this.

The statute creates a rebuttable presumption that an applicant terminated his employment with a wrongful purpose that justifies a 75-day hiatus before public assistance begins. A legislative presumption cannot stand, however,

"when it is entirely arbitrary, or creates an invidious discrimination, or operates to deprive a party of a reasonable opportunity to present the pertinent facts in his defense." *Bandini Petroleum Co.* v. *Superior Court,* 284 U.S. 8, 19 (1931) (holding that there was a "manifest connection" between the proven fact, blowing, release or escape of natural gas, and the presumed fact, unreasonable waste). A statutory presumption is not arbitrary only if "it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Leary* v. *United States,* 395 U.S. 6, 36 (1969) (presumption of knowledge that marijuana was illegally imported), *following Tot* v. *United States,* 319 U.S. 463 (1943) (the possession of a firearm and ammunition presumptive evidence that the firearm or ammunition was transported or received in violation of the Federal Firearms Act). *Accord, United States* v. *Romano,* 382 U.S. 136 (1965) (possession, custody or control of still, presumed by statute from presence at site unless defendant explains presence violates due process clause). Thus, if there is a logical nexus between the proven fact and the presumed fact, the statutory presumption can be upheld. *Bandini Petroleum Co.* v. *Superior Court, supra; Mobile, Jackson & Kansas City Railroad Co.* v. *Turnipseed,* 219 U.S. 35, 43-44 (1910). But where such a connection is lacking, due process is violated. *United States Department of Agriculture* v. *Murry,* 413 U.S. 508 (1973) (food stamps); *Vlandis* v. *Kline,* 412 U.S. 441 (1973) (resident tuition); *Owens* v. *Roberts,* 377 F. Supp. 45 (M.D. Fla. 1974) (three-judge court) (statute relating to transfer of assets as exclusion from welfare eligibility creates rebuttable but irrational presumption that such transfer was for the purpose of becoming eligible for welfare assistance); *DeKalb Real Estate Board, Inc.* v. *Chairman and Board of Commissioners of Roads,* 372 F. Supp. 748, 753-54 (N.D. Ga. 1973)

(posting of sign by real estate broker improperly creates prima facie case of intentional "block-busting").

We hold that the statutory rebuttable presumption is irrational and in violation of the due process clause because there is an insufficient connection between the known fact, that is, application for public assistance within 75 days of an appellant's termination of employment, and the fact presumed by the statute, that is, that the applicant terminated his employment for the purpose of qualifying for public assistance.

Plaintiffs here are all applicants for Home Relief,[2] even though the challenged statute also encompasses applicants for Aid to Families with Dependent Children (AFDC), 42 U.S.C. §§ 601 *et seq.* For present purposes, we perceive no constitutional difference between financial aid received under the federally assisted AFDC and the New York state and local government program of Home Relief.

The amount of the governmental benefit here involved as Home Relief—exclusive of the limited amount of shelter allowance, said to be $3 per day—is $84 a month for one person in a household, $134 for two, $179 for three, $231 for four, $284 for five, and $329 for six, with each additional eligible needy person in the household being entitled to an additional allowance of $45 monthly. N.Y. Soc. Serv. Law § 131-a(3) (McKinney Supp. 1973). The New York City Human Resources Administration 1972 Annual Report indicates that in that year 142,123 persons were receiving Home Relief in New York City, including 60,531 children, and that the average monthly grant for 66,751 cases was $158.41 or $74.40 per person. On the strength of these sums, we think it cannot be assumed that any substantial number of people would terminate their employment in order to receive assistance. *See Rothstein* v. *Wyman,* 303 F.Supp. 339, 348-49 (S.D.N.Y. 1969), *vacated and remanded on other grounds,* 398 U.S. 275 (1970).[3]

Any number of reasons for terminating employment exist—desire for advancement, problems of health, family problems, transportation problems, personality conflicts, working conditions, and perhaps simply basic discontent with a job, to mention a few.[4] Indeed, the New York City Human Resources Administration 1972 Annual Report states that as many as 23 per cent of the applicants for Home Relief in 1967 left their prior employment due to illness. *Id.* at 62. There may also be numerous reasons why a person who terminates his employment subsequently becomes impoverished and has to resort to a request for public assistance—general economic conditions, a decline in jobs available in a particular industry, health, or failure to receive an anticipated new position. Plaintiff Milne, for example, became needy when his employment insurance benefits were delayed for about two months as the result of an erroneous initial disqualification. Thus we view the statutory presumption compelling an inference that plaintiffs left their employment to obtain Home Relief arbitrary, unreasonable and in violation of due process.

Beyond this, while there may be individual exceptions to the contrary, we do not think it can be stated as a general rule, as the statutory presumption would have it, that poor people do not have the same desire to work and to obtain the fruits of work as the non-poor.

As stated in Work in America, Report of a Special Task Force to the Secretary of Health, Education and Welfare (MIT Press 1973), at 176:

> Underneath the resentment and the frustration, and giving rise to them, are a host of unverified assumptions about the character and composition of the welfare population: most poor people don't want to work; most people on welfare are black; welfare mothers have babies to increase their welfare benefits;

> people on welfare live well and easy; most people on welfare want to be on welfare: etc.
>
> Every one of these assumptions is demonstrably false as a generalization and is true only in the occasional particular. The facts are that most poor people are not on welfare and the majority of poor people not only want to work, but do work, year round and full time; black families, though over represented, make up less than half of the AFDC caseload; the average monthly payment for a recipent on AFDC is $49.60; most mothers on AFDC do want to work—it is not difficult to add to the factual side of this misunderstood issue.
>
> . . . [T]hese false stereotypes of poor people, black people and AFDC families are widely held by the general public.

See also Irelan, Low Income Life Styles, U.S. Department of Health, Education and Welfare, Social and Rehabilitation Service, Office of Research and Demonstration (1967) at 5.

In short, the statutory inference that members of the plaintiffs' class leave their employment to obtain Home Relief is not based upon known facts and experience. Under the cases that we have cited, the statute is therefore unconstitutional in creating a presumption not sustainable in fact.

The State argues, of course, that while the statute creates a presumption it is by definition rebuttable[5] and is not burdened by any special standard of proof. The legislature may, the argument runs, rationally intend to deter persons from leaving employment in the expectation of obtaining public assistance, encourage people to be self-sufficient, reduce the unnecessary invasion of the public fisc and allocate the finite public resources for welfare to

persons unable to support themselves. Agreement with all of these points, however, validates only the first sentence of § 131(10); the arguments do not justify the presumption operative so as to impute bad motive in *all* cases. The State points out that the disqualification is only for 75 days, but to the hungry 75 days is sufficient time in which to starve.[6]

In addition, the State argues that since the motive for terminating employment is within the knowledge of the applicant alone it is reasonable for him to bear the risk of nonpersuasion, citing J. Wigmore, Evidence § 2486, at 275 (3d ed. 1940). But as Wigmore himself points out, placing the burden of proof (or the risk of nonpersuasion) on the party who has "peculiar means of knowledge" "furnishes no universal working rule; if it did, then the plaintiff in an action for defamation charging him to be living in adultery should be required to prove that he is lawfully married." *Id.* What we are concerned with here is a matter of fairness and experience, resolving itself ultimately into a question of policy. In the situation before this court, those persons to whom the presumption is directed are typically the least capable to employ the means to rebut the presumption. This can be best shown by the fact that § 131(10) was applied to several of the intervenors notwithstanding little or no indication that leaving their employment was in any meaningful sense "voluntary," let alone for the purpose of reeciving assistance. *See* note 4, *supra.* To require these persons to prove their innocent motives for terminating employment is effectively to deny them all chances of obtaining the benefits which they seek.

The State relies both on *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 43-44 (1973), and *Dandridge* v. *Williams,* 397 U.S. 471, 487 (1970), for the proposition that legislative classifications involving questions of economic and social policy must be given due credit whether

we are talking about welfare benefits or the cost of public education. Both *Rodriguez* and *Dandridge,* however, involve the equal protection clause and its limitations, answering negatively whether or not strict scrutiny would apply so as to require the State to justify its particular law by showing a "compelling State interest." We do not reach the equal protection argument, nor need we do so since what we are here concerned with is an invalid presumption as a matter of due process. The State has cited us to no case which would support the presumption here involved, nor does it attempt to answer the "Brandeis-brief" points made by the plaintiffs and, to a certain extent, relied upon by us above. Only recently, in any event, in a suit brought by Cynthia Hagans et al. against the same defendant here, the Supreme Court held that neither *Dandridge* nor *Rodriguez* could be read "to suspend the operation of the Equal Protection Clause in the field of social welfare." *Hagans* v. *Lavine,* 42 U.S.L.W. 4381, 4385 (U.S. Mar. 25, 1974) (also holding that "recouping emergency rent payments from future welfare disbursements . . . [thereby depriving] needy children because of parental fault, was not so 'patently rational' as to require no meaningful consideration" by the courts). The question remains what form of relief will the court give and to whom?

B. *Class action.*

Plaintiffs ask that it be determined that the action may be maintained as a class action. As we view it, the requirements of Rule 23(b)(2) are met as to a class action. The prerequisites of Rule 23(a) are satisfied since the class is so numerous that joinder of all members is impractical; there is a question of law common to the class, *viz.,* whether the rebuttable presumption is rational and in accord with due process; the claims of the representative parties are

typical of the claims of the class; and, represented by the Legal Aid Society, as they are, the representative parties will fairly and adequately protect the interests of the class. This being true, we also find that the defendants have acted or refused to act on grounds generally applicable to the class, *viz.*, on the basis that the statute is rational and constitutional. We therefore declare that the class is composed of all individuals who have been or may hereafter be disentitled to Home Relief on the basis of the statutory presumption of Social Services Law § 131(10) and its supporting regulations.[7]

We declare the second sentence of § 131(10) and the supporting regulations unconstitutional insofar as they impose on Home Relief and AFDC applicants the burden of proving that their voluntary termination of employment was not "for the purpose of qualifying for Home Relief or aid to dependent children, or a larger amount thereof," and we hereby order that the defendants be and they are hereby enjoined from enforcing the provisions of N.Y. Soc. Serv. Law § 131(10) (McKinney Supp. 1973) and 18 N.Y.C.R.R. § 385.7 in that regard.[8]

II.

There is also before the court a motion by Anthony Brownlee and Ethel Reid for an order permitting them to intervene as parties plaintiff. They cite Fed. R. Civ. P. 23 and 24.

We do not find any response to this motion by defendants but at oral argument counsel for these proposed intervenors stated that, in light of the permitted intervention of the Beverlys and the determination by the State in their case, the reason for any intervention by Brownlee and Reid had largely disappeared. Moreover, these proposed intervenors are presumably members of the class as already

defined. As such they may, if so advised, "enter an appearance through . . . counsel." Fed. R. Civ. P. 23(c)(2)(C). There is no reason for them to intervene, and the motion is denied.

III.

There is also before the Court a motion by defendant Lavine for an order granting judgment for defendants "insofar as the complaint claims that Social Services Law § 131(10) is unconstitutional" (citing Fed. R. Civ. P. 12(c)) or in the alternative for summary judgment to the same effect (citing Fed. R. Civ. P. 56(b). In view of our decision on the motion by plaintiffs, this motion by defendant Lavine must be, and is, denied.

Settle an order or orders.

Done this 11th day of November, 1974.

JAMES L. OAKES
U. S. Circuit Judge

DUDLEY B. BONSAL
U. S. District Judge

INZER B. WYATT
U. S. District Judge

Appendix A.

[1] A 1974 amendment to the New York Social Services Law, N.Y. Laws 1974, ch. 621, § 2, renumbered the provisions challenged in this action to N.Y. Soc. Serv. Law § 131(11) (McKinney supp. 1974), although no change was made in the language.

18 N.Y.C.R.R. § 385.7 provides as follows:

> (a). A person who (1) voluntarily terminates employment or reduces his earning capacity for the purpose of qualifying for assistance or a larger amount thereof, or (2) without good cause fails or refuses to undergo a necessary medical examination or treatment, or to accept referral to and participate in a vocational rehabilitation or training program, including the work incentive program, or refuses to accept referral to and work in employment, including work relief, in which he is able to engage, shall be:
>
> (1). disqualified from receiving assistance for thirty (30) days thereafter and until such time as he is willing to comply with the requirements of this Part; except that
>
> (2). an applicant for or recipient of HR who voluntarily terminated employment or reduced his earning capacity shall be disqualified from receiving assistance for seventy-five (75) days thereafter and until such time as he is willing to comply with the requirements of this Part.
>
> (b). Any person who applies for HR or requests an increase in his grant, within seventy-five (75) days after voluntarily terminating employment or reducing his earning capacity or similarly within thirty (30) days for ADC, shall be deemed to have voluntarily terminated employment or reduced his earning capacity for the purpose of qualifying for such assistance or larger amount thereof in the absence of evidence to the contrary supplied by such person.

While subparagraph (a)(2) facially establishes a conclusive presumption, subparagraph (b) appears to modify it by making the presumption rebuttable. It can be argued that the regulation is internally inconsistent.

[2] Persons eligible for assistance in the Home Relief category established pursuant to § 158 of the New York Social Services Law include:

> Any person unable to provide for himself, or who is unable to secure support from a legally responsible relative, who is not receiving needed assistance or care under other provisions of this chapter, or from other sources, shall be eligible for home relief. However, a person who shall be eligible for aid to dependent children according to the provisions of title 10 of this article shall be granted aid to dependent children and while receiving such aid shall not be eligible for home relief.

Appendix A.

N.Y. Soc. Serv. Law § 158(a) (McKinney Supp. 1973). Examples of persons eligible for Home Relief would be needy adults who are not 65 years of age, blind or disabled. So, too, if a father were working 100 hours a month so as to make the family ineligible for ADC, but his earnings were not enough to support the family, the family would get Home Relief.

[3] Moreover, at least in view of the recent United States Supreme Court decision in *New York State Dep't of Soc. Serv.* v. *Dublino*, 413 U.S. 405 (1973), upholding New York State's work rules (against the general attack of preemption), and hence requiring compliance therewith as a condition of eligibility for assistance, N.Y. Soc. Serv. Law § 131(4), it is not reasonable to presume that currently employed persons would terminate their employment to attempt to avoid work.

[4] In order to maintain a clear record, plaintiff Milne resigned his employment of 17 years' standing as a security guard at Columbia University after he had been charged with alleged misconduct. Plaintiff Streeter did not report for work at Lifesavers, Inc., when the company instituted a new rule that required people to shave their beards after being advised that he could not use a mask in place of shaving his beard. After obtaining new employment as an orderly in a nursing home, he became ill and was unable to call his new employer. He was later told that his employment was terminated. Intervenor Lee's employment was terminated because of allegedly excessive absences, but it is not clear that he did indeed terminate voluntarily.

[5] In practice, however, this "rebuttable" presumption becomes irrebuttable. *See Owens* v. *Roberts*, 377 F. Supp. 45 (M.D. Fla. 1974) (three-judge court). Once a person has been denied Home Relief, he may refute the statutory presumption at a subsequent hearing. Plaintiffs' affidavits indicate that the hearing is normally scheduled three to four weeks after it is requested. Under existing procedures, defendants then have up to 60 days to render a decision. *See Nelson* v. *Sugarman*, 361 F. Supp. 1132 (S.D.N.Y. 1971). Quite obviously, a determination of whether the statutory presumption has been rebutted is totally meaningless when it occurs after the 75 day waiting period. This Catch-22 approach to procedural due process is evidenced in the record by the case of intervenor Lee. He was denied emergency relief on January 31, 1974. On February 5, 1974, he requested a hearing. The hearing was held on April 4, 1974, after the statutory 75 day sanction had run.

[6] In this regard the answer of defendant Lavine to plaintiff's interrogatory number 5 is not insignificant. The question was:

> State whether temporary or emergency assistance is granted under Section 133 of the New York Social Services Law, or under any other provision of law or regulation, to needy persons disqualified from receiving assistance under Section 131(10) of the New York Social Services Law and/or 18 N.Y.C.R.R. § 385.7, pending decisions after "Fair Hearings" requested by such persons . . . .

The answer given was:

> Temporary emergency assistance under § 133 of the Social Services Act is available by its terms only "pending completion of an investigation;" and thus is unavailable after the local agency has denied assistance, whether that denial is based on § 131(10) or any other provision of the Law . . . .

[7] More specifically, the members of the class are those needy persons residing in New York State who have applied for Home Relief or Aid to Dependent Children within 75 days after voluntarily terminating their employment and who have been, or may be, disqualified from receiving such assistance for any period due to the enforcement and application by defendants of the second sentence of N.Y. Soc. Serv. Law § 131(10) (McKinney Supp. 1973) and regulations issued thereunder.

[8] Any questions of interpretation of this order or of the order establishing the class, other than constitutional questions, as well as of the assessment of damages, may be heard by Judge Wyatt, acting individually. *See Rosado* v. *Wyman*, 397 U.S. 397, 402-03 (1970); *Public Service Comm'n* v. *Brashear Freight Lines*, 312 U.S. 621, 625 (1941); *Hamilton* v. *Nakai*, 453 F.2d 152, 160-61 (9th Cir. 1971), *cert. denied*, 406 U.S. 945 (1972).

APPENDIX B

Final Judgment and Order of the Three-Judge District Court.

This cause having come on to be heard by a three-judge District Court pursuant to 28 U.S.C. §§ 2281 and 2284 to hear and determine plaintiffs' constitutional claims, and plaintiffs having moved for final summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure for the declaratory and injunctive relief prayed for in the amended complaint, and defendant Lavine having moved to dismiss the complaint pursuant to Rule 12 of the Federal Rules of Civil Procedure or in the alternative for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure "insofar as the complaint claims that Social Services Law § 131(10) is unconstitutional", and the three-judge court having considered the pleadings, the written interrogatories and answers thereto, the affidavits and exhibits annexed thereto and the memoranda of points of points and authorities of the parties herein, and the three-judge court having heard oral argument on the 10th day of May, 1974, and the three-judge court having filed its opinion on the 11th day of November, 1974, and the three-judge court having found that there is no genuine issue as to any material fact and that plaintiffs' are entitled to judgment as a matter of law in that the second sentence of New York Social Services Law § 131(11) (McKinney Supp. 1974) violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution, it is hereby

ORDERED that defendant Lavine's motion to dismiss the action or in the alternative for summary judgment be and the same hereby is denied, and it is further

Appendix B.

ORDERED that plaintiffs' motion for summary judgment be and the same is granted to the extent set forth below; and it is further

ORDERED, ADJUDGED, AND DECREED that defendants, their offices, agents, servants, employees and successors and all others in active concert and participation with them be and hereby are permanently enjoined from enforcing, against the named plaintiff, the plaintiff-intervenors and all members of the plaintiff class, the presumption contained in the second sentence of New York Social Services Law, § 131(11) (McKinney Supp. 1974) and 18 N.Y.C.R.R. § 385.7 that persons who voluntarily terminated their employment within 75 days preceding their application for Home Relief or Aid To Needy Families With Dependent Children assistance did so for the purpose of qualifying for or receiving a greater amount of such assistance; and it is further

ADJUDGED AND DECREED that plaintiffs are entitled to and are hereby granted a declaratory judgment in this action that the presumption contained in the second sentence of New York Social Services Law, § 131(11) (McKinney Supp. 1974), and in 18 N.Y.C.R.R. § 385.7, that persons who voluntarily terminated their employment within the 75 days preceeding their application for Home Relief or Aid to Needy Families With Dependent Children assistance did so for the purpose of qualifying for or receiving a greater amount of such assistance, violates the Due Process

Appendix B.

Clause of the Fourteenth Amendment to the United States Constitution.

Dated: December 13, 1974
New York, New York

s/ JAMES L. OAKES
Hon. James L. Oakes
United States Circuit Judge

s/ DUDLEY B. BONSAL
Hon. Dudley B. Bonsal
United States District Judge

s/ INZER B. WYATT
Hon. Inzer B. Wyatt
United States District Judge

Judgment Entered:
December 13, 1974

s/ RAYMOND F. BURGHART
Clerk

APPENDIX C

Memorandum Opinion and Order of the Three-Judge District Court Granting a Partial Stay of its Order Pending Appeal.

RONALD MILNE, and others,
Plaintiffs,

—v—

LEONARD BERMAN, and others,
Defendants.

73 Civ. 5397

This is a motion by defendant Lavine for an order staying execution of so much of the final judgment and order of this Court, filed December 13, 1974, as enjoins defendants from enforcing, as against applicants for Aid to Dependent Children (Title 10, New York Social Services Law), the presumption contained in the second sentence of New York Social Services Law § 131(11) (McKinney Supp. 1974). Fed. R. Civ. P. 62(c) The notice of motion does not state the length of the stay requested but presumably it is "during the pendency of the appeal". Fed. R. Civ. P. 62(c)

The notice of motion was returnable on December 19, 1974, when it was submitted (after oral argument) to a single judge and was taken under advisement.

At the time the motion was made, argued, and submitted, there was a stated intention by movant to appeal but no

appeal had in fact been taken. Under the wording of Rule 62(c), it would seem that the motion could not then have been granted because the authority for granting such a motion exists *after* an appeal has been taken. See *United States* v. *El-O-Pathic Pharmacy,* 192 F.2d 62, 79 (9th Cir. 1951)

It now appears that an appeal has been recently taken by movant Lavine, the notice of appeal having been filed with the Clerk of this Court on January 9, 1975.

Copies of the moving papers, of the opposing affidavit, of the Memorandum for Plaintiffs of points and authorities in opposition to motion for a stay (dated December 26, 1974), and of the letter (dated January 6, 1975) of counsel for movant Lavine, have been submitted to all the judges of this three judge Court.

The motion for a stay is granted.

SO ORDERED.

Dated: January 22, 1975

JAMES L. OAKES
James L. Oakes
United States Circuit Judge

DUDLEY B. BONSAL
Dudley B. Bonsal
United States District Judge

INZER B. WYATT
Inzer B. Wyatt
United States District Judge

APPENDIX D

Notice of Appeal.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

73 Civ. 5397
IBW

RONALD MILNE, individual and on behalf of all other persons similarly situated,

Plaintiff,

—and—

DOUGLAS STREETER, ROBERT C. LEE, JOE NATHAN BEVERLY, WILLIE BEVERLY, ODELL BEVERLY, and JOHN BEVERLY, by their mother and next friend, ROBERTA BEVERLY, individually and on behalf of all other persons similarly situated,

Intervenor-Plaintiffs,

—against—

LEONARD BERMAN, individually and as Commissioner of the Westchester County Department of Social Services and ABE LAVINE, individually and as Commissioner of Social Services,

Defendants,

—and—

GEORGE E. BOISVERT, individually and as Commissioner of the Ontario County Department of Social Services,

Intervenor-Defendants.

Appendix D.

SIRS:

PLEASE TAKE NOTICE that defendant Abe Lavine hereby appeals to the Supreme Court of the United States from the Judgment and Order of the three-judge district court dated the 13th day of December, 1974, and entered in the office of the Clerk of the United States District Court, Southern District of New York, on the same day which permanently enjoined defendants from enforcing the presumption contained in the second sentence of New York Social Services Law § 131(11) (McKinney Supp. 1974) and 18 NYCRR § 385.7 that persons who voluntarily terminated their employment within 75 days preceding their application for Home Relief or Aid To Needy Families With Dependent Children assistance did so for the purpose of qualifying for or receiving a greater amount of such assistance; and which declared that same section of that statute violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution; and from an Order of the United States District Court, Southern District of New York dated the 13th day of Deecmber, 1974 and entered in the office of the Clerk of that Court on the same day which declared the action to be maintainable as a class action which class of plaintiffs consists of all persons residing in New York State who have or may apply for public assistance in the Home Relief or Aid to Needy Families with Dependent Children categories within 75 days after voluntarily terminating their employment and who have been, or may be disqualified from receiving such assistance for any period due to the enforcement of the presumption, that such persons terminated their employment for the purpose of qualifying for or receiving a greater amount of such assistance, contained in the second sentence of New York Social Services Law, § 131(11) (McKinney Supp. 1974), and in NYCRR § 385.7; and the said defendant here-

Appendix D.

by appeals from each and every part of said Judgment and Order as well as the whole thereof.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Dated: New York, New York
January 10, 1975

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
By

.....

AMY JUVILER
Assistant Attorney General
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. (212) 488-3443

To: THE LEGAL AID SOCIETY OF
WESTCHESTER COUNTY
56 Grand Street
White Plains, New York 10601
Att: Gerald Norlander, Esq.

HON. GEORGE E. BOISVERT
Commissioner of Social Services
for Ontario County
Canandaigua, New York 14424
Att: Mr. Harrison Downe

Appendix D.

HON. HARRY LOTT
County Attorney
County Office Building
White Plains, N.Y. 10601
Att: Richard A. McAtamney Esq.

MONROE COUNTY LEGAL ASSISTANCE
CORP.
Flood Disaster Relief Project
126 Pine Street Room 303
Corning, New York 14830